Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

Nos. 91-744 and 91-902

In The

SUPREME COURT of the UNITED STATES

October Term, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners/Cross-Respondents

v.

ROBERT P. CASEY, et al.,
Respondents/Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF NINETEEN ARIZONA LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36.2 of this Court, Nineteen Arizona Legislators respectfully submit this brief amici curiae in support of Respondents/Cross-Petitioners, Robert P. Casey, et al. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Amici are senators and representatives of the Arizona State Legislature who have a keen interest in the Court's formulation of

workable principles governing abortion legislation. The resolution of the instant case will affect pending and future regulations concerning abortion in the State of Arizona. Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondents/Cross-Petitioners and assist the Court in the resolution of these issues. Our focus will be narrowly limited to an assessment of the "undue burden" test.

SUMMARY OF ARGUMENT

The undue burden test lacks critical features of a workable constitutional principle. In particular, the test is deficient because it does not, when logically parsed, provide an informative standard which can guide decision-making in this area. The undue burden approach may be viewed either as a process of analysis or as a shorthand judgment of what the weighing of interests between the woman and the fetus yields. If the latter, the test summarizes the view that the interest of the woman is of overriding significance in a given case. Employed in this way, however, the test is not a decision-principle applied in reaching a legal conclusion, but is rather merely the conclusion restated. In order to be a genuine mode of analysis, the undue burden criterion must offer a principle that can be used to derive a conclusion favoring the interest of the woman. On this score, however, the undue burden analysis cannot succeed.

Where no undue burden on a woman's interest is found, the competition between the interest of the woman and that of the fetus is not problematic. If an undue burden is discerned, however, it indicates simply that the possibility of a conflict between these competing interests has materialized. In other words, the existence of the undue burden is weaker than that required if the test is to have real value, for the finding of an undue burden is intended to show that the scales have tipped in favor of the interest of the woman.

The practical upshot of our analysis for the purposes of this case is that the undue burden test cannot logically be applied to invalidate the spousal notification requirement. Rational review analysis is the only coherent approach to review abortion regulations, and under that standard the spousal notification requirement passes muster.

ARGUMENT

I. THE UNDUE BURDEN TEST IS ANALYTICALLY DEFICIENT.

In a substantive due process case, the selection of a standard of review is the critical first step in resolving the constitutionality of a challenged law or regulation. In its opinion below, the Third Circuit concluded that a majority of this Court had declined to follow the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), based on the Court's analyses in *Hodgson v. Minnesota*, (1990) and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). The Third Circuit declined, however, to apply rational basis review because of Justice O'Connor's statement in *Hodgson* that such review was reserved for regulations that did not "unduly burden" the abortion decision. *Planned Parenthood v. Casey*, 947 F. 2d at 696 (*citing Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring in part and concurring in the judgment in part)). Relying upon *Marks v. United States*, 430 U.S. 188,193 (1977), the Third Circuit concluded that Justice O'Connor's undue burden analysis was the "law of the land" (947 F.2d at 698) because it was the "narrowest ground" upon which a majority of the Supreme Court would agree. Id. at 693.

The undue burden analysis derives from Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983)(O'Connor, J., joined by White & Rehnquist, JJ., dissenting). Justice O'Connor referred to the woman's interest as a limited fundamental right, triggering strict scrutiny if the regulation causes an undue burden on the woman's decision whether to seek an abortion. If an undue burden is not

discerned, rational review applies. *Akron*, 462 U.S. at 453, 465 n. 10 ("If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose"). An undue burden occurs when a regulation imposes an "absolute obstacle[] or severe limitation[] on the abortion decision. It is not enough that a regulation "may 'inhibit' abortions to some degree." *Akron*, 462 U.S. at 464.

The undue burden test seems attractive because it appears to offer a method of decision-making independent of and more intuitively valid than the trimester framework of *Roe*. An "undue burden" is viewed as a distinct factor in the balance of interests, or at least a description of the state of affairs where such a factor is present. It is thought to be a consideration which carries sufficient weight to tip the balance decisively, to convey information affecting the analysis of the respective interests of the fetus and mother in a concrete way.

Upon closer inspection, however, the test does not hold up as a meaningful principle. It does not do what it purports to do, namely, advance the resolution of the issue of competing interests. Instead, where an undue burden is found, this indicates merely that the possibility of an actual conflict between the competing interests of the mother and the fetus has materialized; that a genuine dilemma has arisen which, like any dilemma, requires a decision-principle in order to be resolved. The undue burden test establishes that such a principle is required, but it does not give that principle to us. To use the metaphor of a grocer's balance, the discerning of an undue burden tells us only that, in order to resolve a conflict, it is time to retrieve the balance from the cupboard. It does not tell us which way the balance will tip when the respective interests are weighed in a given case.

To see this, consider a different situation where competing interests are found involving property claims. Assume generally that having a property interest includes both the right of access to one's property and the right to prevent others from ingressing

one's property. In the abstract, the co-existence of the two interests implies the potential for a conflict of those interests in a particular case. Suppose that X has undertaken to build an access road, beginning on his land but crossing a portion of Y's land in order to reach another point on his own property. Y does not want the road built.

In such a case, the potential for conflict between X's property interest and Y's property interest has become actual: either X's interest or Y's interest must give way. X will claim that it would be an impermissible burden on his interest if he were prevented from completing an access road, while Y will claim that he would suffer a similar impermissible burden if he were precluded from stopping X's construction. *Cf. Finn v. Williams*. 376 Ill. 95, 33 N.E. 2d 226 (1941).

X and Y both assert that their being impeded is an impermissible burden on their respective interests. But if litigation ensues, the mere existence of such impermissible burdens would not settle the issue. Other factors would have to be considered for that to occur. If a court were to rule that X had no right to build the road on Y's land, X will still maintain that he suffered an impermissible burden on his property interest. On the other hand, if it were ruled that X had such a right, Y will argue that he has sustained an impermissible burden on his property interest.

To have an actual conflict in this hypothetical case means that whichever way the court rules, a burden will be imposed on one of the two competing interests -- a burden that, in ordinary experience, would be undue or impermissible. (If the burden were not, in general, impermissible, a claimant could not appeal to that burden as grounds for adjudication in his favor.) Therefore, the identification of such burdens does not show how the scales of justice must tip. It merely shows that an actual conflict between undue burdens exists.

In the abortion context analogous competing interests are involved. The respective interests of the fetus and the woman are

potentially in conflict, and if a regulation impedes the woman's ability to have an abortion, an actual conflict can materialize. That the woman can claim there is an impermissible burden on her right to secure an abortion only demonstrates that the conflict of interests between the fetus and the woman has generated a dilemma. That is, the legitimate claim by the woman that a burden has been imposed which is normally an impermissible burden only shows that a potential conflict has become an actual conflict.

That a regulation is unduly burdensome would be useful in assessing its constitutionality only if this fact conveyed something in addition to the dilemma-producing information already present. But it does not. It is information relevant not to the balancing of interests, but rather to the issue of whether a potential conflict of interests is an actual conflict in a given case. The existence of an undue burden is not a distinct piece of information relevant to assessing which interests are more important, but is rather just part and parcel of the conflict itself. To say that there is an undue burden is merely to describe the dilemma, not to resolve it.

The same point may be illustrated using the analytical concept of defeasibility. Defeasible rights are rights that can be overridden in special circumstances. For example, the right to liberty can be overridden by competing factors if a person engages in criminal activity. Once these factors are no longer in play – once the grounds for imprisonment no longer exist – the right to liberty once again predominates, making continued imprisonment no longer permissible. Such a right is defeasible, not disappearing: It does not come and go as one enters and is released from prison. It is inalienable, but in a way that allows the exercise of the right to be overridden, or defeated, by special circumstances.

Likewise, when the competing interests of the woman and the fetus are in actual conflict, it would be a mistake to think that the burden placed on one interest can be erased by a justification for preferring the other interest. For example, the Court recognized in *Roe* that the interest of the fetus may predominate over the

woman in the third trimester, holding that in the third trimester the state may "regulate, and even proscribe, abortion." *Roe*, 410 U.S. at 165. *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60 (1976) (the Court in *Roe* "emphatically rejected . . . the proffered argument 'that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.'" (*quoting Roe*, 410 U.S. at 153)). Yet, it would be plainly incorrect to say that the burden imposed by an abortion regulation is any less onerous in the third trimester than in the first. The passage of time has not rendered the burden any less "undue." It is still an impermissible burden, but a defeasibly impermissible burden, in the same way that imprisonment is an undue burden on the right to liberty, but a defeasibly impermissible burden. In short, the undue burden test does not logically provide information for tipping the balance in favor of the interest of the woman over that of the fetus, for the undue burden exists solely by virtue of the fact that a potential conflict of interests has become a real conflict.

In this rendering of the undue burden analysis, it functions as a piece of information to be employed in arriving at a judgement. As shown above, taken in this way, the existence of an undue burden cannot *resolve* a dispute. There is, however, another way to employ this idea.

Instead of being a piece of information to be weighed in the balance, the claim that a regulation unduly burdens a woman's interest could be a conclusion, that is, it could be regarded as a shorthand judgement of what the weighing of the respective interests yields. Advocates of the test as understood in this way would insist on a distinction between a *burden* on a right or interest and an *undue* burden. In this view, the existence of a burden which is, in general, impermissible, fails to show that the burden in the present case is impermissible. To be impermissible here, it would have to be the kind of burden which overrides all other factors relevant to a resolution of the case. Used in this more robust sense, to say that an undue burden exists is to say that

the burden imposed on a woman by a regulation outweighs any other competing factor, including the interest of the fetus.

There are two obvious reasons for concern about interpreting the undue burden analysis in this way. First, it converts the test into the conclusion of a legal argument rather than a principle to be employed in arriving at a conclusion. Used in that fashion, the undue burden test would not be a means for determining when a regulation needs special justification. Rather, it would be merely the conclusion restated. Second, if it were suggested that the finding of an undue burden actually be treated as a conclusion, the issue remains: What is the justification for it? The test simply begs the question.

In sum, if the undue burden test were meant to be a guiding principle to be employed in the process of reaching a conclusion, it cannot succeed, for it provides no additional information beyond affirming that an actual dilemma is present rather than a merely potential conflict of interests. If, however, the undue burden test were not to be construed in this way, but were rather a shorthand judgement about how the dilemma is to be resolved, a decision-principle for the resolution must still be found. That principle is what the undue burden test was meant to reveal, but in this the test fails.

II. RATIONAL REVIEW IS THE ONLY COHERENT STANDARD OF REVIEW FOR ABORTION REGULATIONS.

The *Roe* majority embraced the proposition that there is a fundamental right to privacy. This includes "the right of the *individual*, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). While *Roe v. Wade* rejected, at least formally, the assertion that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses," 410 U.S. at

153, in reality, the abortion right enunciated in *Roe* thereafter became essentially absolute as the Court invalidated virtually every regulation of the abortion decision.

Because regulations affecting a fundamental right warrant strict scrutiny and are thus virtually certain to be invalidated, much debate has been devoted to the constitutional status of a right to privacy and whether a right of personal autonomy and the attendant right to an abortion are entailed by it. *See, e.g.*, Eichbaum, *Towards An Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C.R.-C.L. L. Rev. 361, 362, 365 (1979)(Privacy rights are said to be "grounded in notions of individual autonomy," because "[t]he human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a lifestyle which allows expression of their uniqueness and individuality"); Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1, 31 (1980)(In recognizing a constitutional right to privacy, the Court has given effect to the view "that persons have the capacity to live autonomously and the right to exercise that capacity"). It is not necessary, however, to resolve this controversy in order to see the inadequacy of strict scrutiny review in the abortion context.

Let us assume *arguendo* the existence of a constitutional right to privacy and, further, that the privacy right implicates the right of dominion over one's person, including the abortion decision. It does not follow that strict scrutiny is a coherent standard to review abortion regulations. Some implications are purely logical and hence indefeasible; others are defeasible. If the connection between the right to privacy and the right of full personal autonomy were a logical one, no further countervailing information could sever that connection. If that were true, however, other patently non-cognizable issues would demand strict scrutiny analysis. For example, regulations restricting breast implants for health reasons ostensibly would raise a right to privacy issue and thus would be susceptible of strict scrutiny

review by virtue of affecting a right of dominion over one's person. Yet, as a legal matter such regulations would not be viewed as implicating the right to privacy, for the connection between these rights is only a defeasible one. Where important interests are involved which override the wishes of a person seeking a breast implant, as is the case when health and safety concerns arise, a regulation may limit self-dominion without requiring strict scrutiny.

Appealing to the defeasible character of the implication involved provides an explanation for the conclusion that strict scrutiny would be inappropriate to assess such regulations: The right to privacy, though generally implicated by a right of personal autonomy, does not demand strict scrutiny when countervailing circumstances obtain. But for the defeasible character of the implication, no rational basis could be found for eschewing strict scrutiny in a vast array of cases where it is clearly unwarranted.

Similarly, while there is a connection between the right to privacy and the right to an abortion, it would be fallacious to insist that this connection holds regardless of the circumstances. What this means, effectively, is that strict scrutiny cannot be a valid approach to regulating abortion decisions, even if a privacy right is assumed. Even if a woman has a constitutionally protected privacy right, any attempt to infer from this that all abortions -- or all abortions within a certain timeframe -- are permissible ignores the defeasible character of the rights and implications in question. Put another way, if strict scrutiny of abortion regulations were appropriate, it could only be because some justification were available for thinking that the interest of the woman necessarily predominates over that of the fetus, at least during a particular period of time. As the disintegration of the rationale of *Roe v. Wade* shows, however, no reasonable foundation for such a view exists.

A sense of the defeasible character of the connection between these rights may underlie Justice O'Connor's suggestion that the right to an abortion is a limited fundamental right warranting

heightened scrutiny in certain cases. In the language of the foregoing discussion, a *limited* fundamental right may be viewed as one which is defeasibly implicated by a fundamental right. As shown in Section I, however, the undue burden test fails to provide a suitable analytical device for gauging when such heightened scrutiny should apply. Moreover, it is not at all clear that any alternative test designed along the same lines could avoid the conceptual flaws of the undue burden test. This strongly suggests that rational review is the only coherent standard for reviewing abortion regulations. Advocates of more restrictive alternatives to rational review carry the burden of generating workable principles to that end. Without such principles, the rational review standard remains presumptively valid and dictates the only proper course for evaluating abortion regulations.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed in all respects except as to its ruling concerning the spousal notification requirement. Because that regulation clearly passes constitutional muster under the rational review standard, the decision should be reversed and remanded as to that issue.

Respectfully submitted,

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